

EXHIBIT G

January 20, 2022 Hearing Transcript

Page 1

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 Case No. 18-23538-rdd

4 - - - - - x

5 In the Matter of:

6

7 SEARS HOLDING CORPORATION ET AL.,

8

9 Debtors.

10 - - - - - x

11

12 United States Bankruptcy Court

13 300 Quarropas Street, Room 248

14 White Plains, NY 10601

15

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17 January 20, 2022

18 2:10 PM

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21 B E F O R E :

22 HON ROBERT D. DRAIN

23 U.S. BANKRUPTCY JUDGE

24

25 ECRO: ART

1 HEARING re Status Update on Debtors; Progress Towards
2 Effective Date.

3

4 HEARING re Notice of Hearing on Interim Applications for
5 Allowance of Compensation and Reimbursement of Expenses on
6 January 20, 2022 at 2:00 p.m. (ECF #10171)

7

8 HEARING re Monthly Fee Statement Ninth Interim Fee
9 Application of Prime Clerk LLC, as Administrative Agent to
10 the Debtors, for Services Rendered and Reimbursement of
11 Expenses for the Period from July 1, 2021 through October
12 31, 2021 filed by Prime Clerk, LLC. (ECF #10162)

13

14 HEARING re Application for Interim Professional Compensation
15 /Sixth Interim Fee Application of Henick, Feinstein LLP as
16 Special Conflicts Counsel to the Official Committee of
17 Unsecured Creditors for Allowance of Compensation for
18 Services Rendered and Reimbursement of Expenses for the
19 Period of July 1, 2021 through October 31, 2021
20 for Herrick, Feinstein LLP, Special Counsel, period:
21 7/1/2021 to 10/31/2021, fee:\$76,275.00, expenses:
22 \$30,428.89. filed by Herrick, Feinstein LLP. (ECF #10156)

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Page 3

1 HEARING re Application for Interim Professional Compensation
2 Eighth Joint Application of Paul E. Harner, as Fee Examiner
3 and Ballard Spahr LLP, as Counsel to the Fee Examiner, for
4 Interim Allowance of Compensation for Professional Services
5 Rendered and Reimbursement of Actual and Necessary Expenses
6 Incurred from July 1, 2021 through October 31, 2021 for Fee
7 Examiner, Other Professional, period: 7/1/2021 to
8 10/31/2021, fee:\$276793.00, expenses: \$0.00. filed by Fee
9 Examiner. (ECF #10161)

10 .

11 HEARING re Application for Interim Professional
12 Compensation/Ninth Application of Weil, Gotshal & Manges
13 LLP, as Attorneys for the Debtors, for Interim Allowance of
14 Compensation for Professional Services Rendered and
15 Reimbursement of Actual and Necessary Expenses IncmTed from
16 July 1, 2021 through and including October 31, 2021 for
17 Weil, Gotshal & Manges LLP, Debtor's Attorney, period: 7
18 /112021 to 10131/2021, fee:\$2,517,997.00, expenses:
19 \$148,882.59. filed by Weil, Gotshal & Manges LLP. (ECF
20 #10160)

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Page 4

1 HEARING re Objection to Motion FOR COMPENSATION BY (1) AKIN
2 GUMP HAUER & FIELD LLP [Doc. 10154]; (2) FTI CONSULTING INC.
3 [Doc. 10155]; AND (3) WEIL, GOTSHAL & MANGES LLP [Doc.
4 10160] (related document(s) 10160, 10154, 10155) filed by
5 Alexander Tiktin on behalf of Orient Craft Ltd. (ECF #
6 10191)

7

8 HEARING re Application for Interim Professional Compensation
9 // Ninth Interim Fee Application of Akin Gump Strauss Hauer
10 & Feld LLP as Counsel to the Official Committee of
11 Unsecured Creditors for Allowance of Compensation for
12 Services Rendered and Reimbursement of Expenses for the
13 Period of July 1, 2021 Through and Including October 31,
14 2021 for Akin Gump Strauss Hauer & Feld LLP, Creditor Comm.
15 Aty, period: 711/2021 to 1013112021, fee: \$839,969.00,
16 expenses: \$287,232.21. filed by Akin Gump Strauss Hauer &
17 Feld LLP. (ECF #10154)

18

19 HEARING re Objection to Motion FOR COMPENSATION BY (1) AKIN
20 GUMP HAUER & FIELD LLP [Doc. 10154]; (2) FTI CONSULTING INC.
21 [Doc. 10155]; AND (3) WEIL, GOTSHAL & MANGES LLP [Doc.
22 10160] (related document(s) 10160, 10154, 10155) filed by
23 Alexander Tiktin on behalf of Orient Craft Ltd. (ECF #
24 10191)

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1 HEARING re Application for Interim Professional Compensation
2 // Ninth Interim Application of FTI Consulting, Inc.,
3 Financial Advisor to the Official Committee of Unsecured
4 Creditors of Sears Holdings Corporation, et al. for Interim
5 Allowance of Compensation and Reimbursement of Expenses for
6 the Period from July 1, 2021 Through October 31, 2021 for
7 FTI CONSULTING, INC., Other Professional, period: 7/112021
8 to 1013112021, fee:\$266,139.00, expenses: \$0.00. filed by
9 FTI CONSULTING, INC. (ECF #10155)

10

11 HEARING re Objection to Motion FOR COMPENSATION BY (1) AKIN
12 GUMP HAUER & FIELD LLP [Doc. 10154]; (2) FTI CONSULTING INC.
13 [Doc. 10155]; AND (3) WEIL, GOTSHAL & MANGES LLP [Doc.
14 10160] (related document(s)10160, 10154, 10155) filed by
15 Alexander Tiktin on behalf of Orient Craft Ltd. (ECF #
16 10191)

17

18 HEARING re Motion for Objection to Claim(s) Number: 20138
19 and 26385 of the North Carolina Department of Revenue (ECF
20 #9985)

21

22 HEARING re Response to Motion (related document(s)9985)
23 filed by Matthew Sommer on behalf of North Carolina
24 Department of Revenue (ECF #10163)

25

1 HEARING re Motion to Compel I Motion to Enforce the Order
2 (I) Authorizing Assumption and Assignment of Lease with MOAC
3 Mall Holdings LLC and (II) Granting Related Relief filed by
4 Richard A. Chesley on behalf of Transform Holdco LLC (ECF #
5 10194)

6

7 HEARING re Motion to File Under Seal/ Motion of Transform
8 Holdco LLC for Leave to File Under Seal Portions of
9 Transform Holdco LLC's Motion to Enforce and Accompanying
10 Exhibits filed by Richard A. Chesley on behalf of Transform
11 Holdco LLC. (ECF #10193)

12

13 HEARING re Order to Show Cause signed on 12/28/2021 why an
14 answer with attorney representation has not been filed by
15 Defendant, Grace and Son Construction Company of Greenville,
16 Inc. and why Defendant has not retained counsel to represent
17 it in this adversary proceeding (ECF #7)

18

19 HEARING re Notice of Agenda of Matters Scheduled for Hearing
20 to be Conducted Through Zoom on January 20, 2022 at 2:00
21 p.m.

22

23

24

25 Transcribed by: Sonya Ledanski Hyde

1 A P P E A R A N C E S :

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13 BY: GREGORY OTSUKA (TELEPHONICALLY)

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20 BY: DAVID DYKHOUSE (TELEPHONICALLY)

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1 don't need to stay on either.

2 MS. MORABITO: Thank you, Your Honor.

3 THE COURT: Okay, very well. So, let's go back to
4 the Transform Hold Co.-MOAC Mall motion.

5 MR. MARTIN: Good afternoon, Your Honor, this is
6 Craig Martin from DLA Piper, representing Transform. Can
7 you see and hear me all right?

8 THE COURT: Yes, fine, thanks.

9 MR. MARTIN: Thank you, Your Honor.

10 MR. OTSUKA: Good afternoon, Your Honor. This is
11 Greg Otsuka for MOAC Mall Holdings. Also with me on the
12 Zoom hearing is David Dykhouse of the Patterson Belknap
13 Firm. Your Honor, I would just note that I filed my pro hac
14 vice application on January 10. I have not seen an order
15 yet granting that motion, but I would ask the Court's
16 permission to appear and argue today?

17 THE COURT: Okay. Did you email it to chambers
18 with a proposed order?

19 MR. OTSUKA: I did, Your Honor.

20 THE COURT: Okay. It's probably already been
21 sent, or if it won't, it will get entered very shortly. So,
22 you can certainly argue today.

23 Okay. I have reviewed the pleadings related to
24 this motion. And the first one is Transform's motion to
25 file portions of its motion under seal. The parties didn't

1 exactly file my procedures for a sealing motion; namely, to
2 provide me, by email, with the motion, the unredacted
3 document and the proposed order. But I've reviewed the
4 unredacted documents and the redactions. And I'll note that
5 I don't believe there is any opposition to the sealing
6 motion, and that, in fact, MOAC has tried to comply with the
7 relief that was sought, but redacting certain portions of
8 its objection.

9 So, my inclination, unless anyone has anything
10 more to say about this, is to enter an order directing the
11 sealing of the motion papers and the objection, and having
12 the redacted versions be the only versions on the public
13 docket of the case.

14 Those types of orders are always subject to
15 someone's seeking to reopen the matter. But frankly, this
16 is not particularly a matter of public note. I think it
17 really does fit very cleanly into what 107(b) generally
18 deals with, which is commercial information; the disclosure
19 of which could put a party at a disadvantage.

20 And so, again, I'm inclined to grant the motion.
21 Does anyone have anything to say about it?

22 MR. MARTIN: Your Honor, this is Craig Martin.
23 Mr. Otsuka and I did confer prior to the hearing, and we're
24 grateful for Your Honor inuring that; we thought you might,
25 in lack of the opposition. And we think that we can conduct

1 the hearing without any need to seal anything that we're
2 going to argue today. So, I'll simply refer to the
3 subtenant as 'Subtenant.' And much of what we needed to
4 redact, is not going to be relevant for today's hearing; if
5 it is, we'll address it. But we did confer, and I think we
6 can cover it without sealing the hearing or any portion of
7 the transcript.

8 THE COURT: Okay, very well. So, I'll ask you
9 then, Mr. Martin, to email the sealing order to chambers.

10 MR. MARTIN: We will do so after the hearing, Your
11 Honor. Thank you.

12 THE COURT: Okay. So, then we have the underlying
13 motion and the opposition. I guess, the first thing I want
14 to ask is, has there been any development on the motion for
15 a stay under Federal Appellate Rule 41 of the issuance of
16 the mandate?

17 MR. OTSUKA: Your Honor --

18 MR. MARTIN: Go ahead, Mr. Otsuka.

19 MR. OTSUKA: Sorry, Your Honor. Greg Otsuka. The
20 only development is that, that motion is currently in
21 briefing in the second circuit. We filed the motion.
22 Transform has filed the response. We have time to file a
23 reply. But as of now, that motion is pending.

24 THE COURT: Okay. All right. So, I'm happy to
25 hear brief oral argument on this. I guess I'd like the

1 parties to focus first, though, on the stipulation and order
2 from the District Court, so ordered in March of 2020, by
3 then Chief Judge McMahon, and how it affects the motion now
4 before me.

5 MR. MARTIN: Yes, Your Honor. If it pleases the
6 Court, I'd be happy to go first on our view on that.

7 THE COURT: Okay.

8 MR. MARTIN: Craig Martin, again, for the record.
9 So, our view on that is -- and I think if you look -- it's
10 important to understand the context in which that order was
11 entered. Initially, we argued in front of the District
12 Court, the substance of the motion, and MOAC prevailed on
13 that. And that consent and stipulation order was then
14 entered.

15 After it was entered, we then filed a motion for
16 rehearing, which was granted. That resulted in MOAC filing
17 an appeal on the rehearing motion, and that's what we argued
18 to the Second Circuit Court of Appeals.

19 The problem with the consent order is that in
20 paragraph 2, it says that it would be, remain in place until
21 the Second Circuit Rules, which has occurred. As MOAC
22 points out in their briefing, I believe it's paragraph 6,
23 says that that order would not terminate until the mandate
24 issues.

25 THE COURT: Paragraph 5.

1 MR. MARTIN: Yeah, paragraph 5, I apologize. I
2 think the key is, is that in the actual Second Circuit
3 judgment, in their very last footnote, they talk about how,
4 because of the way in which the District Court judgments and
5 orders were entered, there never was a judgment entered.
6 And that as a result, that consent and stay order ceased to
7 have effectiveness.

8 Because, the way I read their footnote is, number
9 one, it related to the original judgment of the District
10 Court, which was vacated by the order on the rehearing. And
11 number two, because under the various rules of procedure,
12 had a judgment been entered by the District Court on the
13 rehearing order, that judgment wouldn't become final in 150
14 days; which time has passed. And the consent order would
15 have lost its efficacy.

16 So, our view is that for those two reasons,
17 indicated by the Second Circuit in its footnote, in its
18 summary order, disposing of the matter, the consent order
19 and stipulation does not have any effect any longer.

20 And if Your Honor needs me to direct it to you,
21 would be happy to --

22 THE COURT: Well, I'm looking for it here. Can
23 you just read it? Rather than my leafing through here, can
24 you read that note?

25 MR. MARTIN: Yes. I'm reading from Exhibit F of

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1 our motion. It's the final page, footnote 3. It's quite a
2 long one. But in essence, it says that the District Court's
3 May 11, 2020 order granting Transforms motion for rehearing,
4 and vacating the Court's original decision in favor of MOAC,
5 in its June 8, 2020 order denying MOAC's motion for
6 rehearing, and directing the District Clerk of Court, in
7 effect, to close the case; together constitute a final
8 decision that, quote, "Ended the litigation of the merits
9 and left nothing four the Court to do but execute the
10 judgment." Citing *Hall v. Hall*, in 28 USC 12 91.
11 Parenthetical omitted.

12 Continuing. We appreciate that on March 11, 2020,
13 the District Court entered a stay of what it described as
14 its initial judgment in favor of MOAC. The District Court
15 may well have thought that the stay remained in place, after
16 it later granted Transform's motion for a rehearing. We
17 note, however, that no judgment of the District Court was
18 ever actually set forth in a separate document at any point.
19 Of course, in the absence of a separate document, judgment
20 is deemed entered 150 days after the order from which the
21 appeal lies and is entered, citing Federal Rule of Civil
22 Procedure 58(c)(2)(B). But we will repeat our strong
23 suggestion that where, quote, "The district Court makes a
24 decision intended to be final, the better procedure is to
25 set forth the decision in a separate document called a

1 judgment." Citations omitted.

2 That's the complete footnote, Your Honor. So, as
3 we read that, as I say, we believe the Second Circuit is
4 pointing out that the consent stay and stipulation expired
5 by operation of the Federal Rule of Civil Procedure
6 governing final judgments issued by District Court, up to
7 the Second Circuit.

8 THE COURT: For one of jurisdiction, in essence, I
9 guess, right?

10 MR. MARTIN: I suppose so. You know, you always
11 to hate to second guess anything any party's done. But
12 certainly is MOAC is concerned about a further stay, they
13 could have sought that from the Second Circuit.

14 And that's why I wanted to put that consent
15 stipulation in context. It was originally entered on a
16 motion in which Transform had lost the appeal. And so, the
17 design behind it, in my mind -- Mr. Otsuka may disagree --
18 but it was to protect us from not being able to continue to
19 pursue subleases. Of course, we've now obtained a sublease.
20 And then, when the rehearing happened, neither party did
21 anything with respect to that. And I construe the Second
22 Circuit is saying, because of neither party doing anything,
23 and because the District Court didn't enter any judgment, to
24 the extent that stay remained valid, it expired under
25 Federal Rule of Civil Procedure 58, 150 days after the

1 District Court's judgment. And that time period passed long
2 ago. The appeal was pending for quite some time in the
3 Second Circuit.

4 THE COURT: Okay. Mr. Otsuka, you want to address
5 that point, and then we can go onto the other ones?

6 MR. OTSUKA: I would Your Honor. Thank you. A
7 few points: The first is, except for the first sentence or
8 two of Mr. Martin's argument that he just made, none of that
9 argument appears in their briefing. We raised this issue in
10 our response.

11 In their reply, it's one paragraph on page 7 of
12 the reply. And they hang their hat on the phrase in
13 paragraph 2, of this order that says, "Until any ruling of
14 the Second Circuit of Appeals."

15 So, the first point is, the rest of that argument
16 has not been made and should not be allowed right now.

17 In any event, the order of the District Court
18 says, "Judgment of this Court shall be stayed." It doesn't
19 refer to any -- the judgment that was just entered, at the
20 time of this order. As Mr. Martin pointed out, after
21 Transform lost on the merits in the District Court, they
22 asked our consent to enter into this stay. And it was only
23 after we agreed and then -- that the Court entered this
24 stay.

25 And then, the very next day, Transform, for the first time,

1 raised this jurisdictional argument; which as we point out
2 in our papers, they assured this Court that they would not
3 make it on any later appeal. So, in our view, this order
4 clearly stays the judgement of the District Court. It
5 doesn't refer to only the first judgement, and moreover, it
6 is also clear that the stay is in place until the sending
7 down of the mandate of the Second Circuit, which hasn't
8 happened.

9 THE COURT: I -- I agree with you on those points.
10 I think that if you just stopped in paragraph three, I
11 wouldn't, but it seems to me that paragraph five is -- is in
12 keeping with what you just said. But, I guess that leaves
13 the issue addressed in the footnote to the Second Circuit's
14 decision, which is I think a pretty strong indication that
15 the Circuit doesn't believe this stay is in effect at this
16 point.

17 MR. OTSUKA: Well, I would also say, Your Honor,
18 that it was a footnote after -- I think it's a footnote to
19 the word affirmed. So it's clearly dicta. They don't say -
20 -

21 THE COURT: It's from the Second Circuit.

22 MR. OTSUKA: I -- I understand.

23 THE COURT: I'm not that pretty -- I'm not that
24 eager to just ignore it.

25 MR. OTSUKA: And I'm not suggesting that you

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1 ignore it, Your Honor. But I also point out that they don't
2 come out and say this order is not effective. They -- they
3 -- they -- they make comments about the order --

4 THE COURT: No, but they do -- but they do say the
5 judgement is -- is -- that in essence it's -- it's done.
6 Now they -- I think they can reconsider that, or rethink
7 that as part of the briefing on the stay of the mandate, the
8 requested stay of the mandate, but -- but at least as far as
9 what I have before me right now, it doesn't seem to me like
10 they would be holding the parties to this stipulated order.

11 MR. OTSUKA: Well, the other point I would make,
12 Your Honor, is whatever the judgement -- whatever the
13 effectiveness the judgement may have, the terms of this
14 order say that the stipulation made itself, shall remain in
15 place until the standing down of the mandate. What we're --
16 what we are relying on is in paragraph three, that Transform
17 shall not do a number of things, and as long as the mandate
18 is not issued, this stipulation remains in place and
19 Transform shall not do all of those things that are
20 identified in paragraph three.

21 THE COURT: Well, again though, but if -- if -- if
22 the -- the court that so ordered it can't enforce it, I'm
23 not sure that means anything. But let me ask a related
24 question, and this is to both of you. The -- the sublease
25 has a -- a provision that talks about when the lease term

1 commences, Section 1.2, which refers to the litigation
2 resolution date, and then that definition of litigation
3 resolution references another definition, the "critical
4 determination". And regardless of whether this -- this
5 stipulation is a binding order; this is really I guess a
6 question for Mr. Martin first. Why isn't the lease -- the
7 sublease itself one that contemplates the term commencing
8 only when you have a final order, as people define final
9 orders, i.e. it -- it doesn't admit of any rehearing,
10 reconsideration, transfer or appeal, and any further
11 possibility of any stay, remand, removal, rehearing,
12 reconsideration, transfer, or appeal resulting in the
13 critical determination; and I guess, in light of that, given
14 that there is a pending motion under Rule 41D to stay the
15 mandate and the possibility of a cert petition after that.
16 The -- the relief you're seeking here, ultimately, it would
17 occur to me doesn't -- doesn't -- doesn't -- the lease
18 doesn't start -- the sublease doesn't start until that
19 process is done. So, I guess ultimately the question I have
20 is why are we here at this point?

21 MR. MARTIN: Yes. Craig Martin, again, for the
22 record. I don't disagree with the way that, Your Honor, is
23 reading it that the litigation resolution is the date by
24 which various events would begin to occur that would lead to
25 occupancy. The reason we're here today, however, is because

1 of the assignment order that, Your Honor, entered after our
2 trial, ECF Number 5074 had certain conditions in it that we
3 needed to satisfy within certain time periods.

4 The two that we're worried about, specifically,
5 and that we submit we have satisfied, is that the -- we've
6 given the MOAC in it's capacity as a Landlord it's rights
7 under Section 6.3 of the Master Lease. And the second item
8 that we're concerned about is that, Your Honor's order,
9 signed an order required that we at least lease some portion
10 of the property subject to the Master Lease.

11 THE COURT: Well, except it really wasn't -- I --
12 I read that provision a little differently than -- than I
13 think you do, and maybe you're being extra careful about it.
14 But -- and I -- I go back to the transcript. The -- the two
15 year limitation came up because this was a very long term
16 lease and there was 70 more years left to run on it. And --

17 MR. MARTIN: Correct.

18 THE COURT: -- under the case law, I was concerned
19 that if it just remained -- if you said to, or left MOAC to
20 believe that you were perfectly content to leave the space
21 empty for 70 years, they would be forced to pay you
22 something and I didn't believe that was right under the case
23 law. And during oral argument, one of your colleagues,
24 counsel for Transform, said well, we think we will get it
25 leased within two years. That's a reasonable time. There

1 was testimony to that effect and so long as the landlord
2 didn't block us from doing that. And obviously that
3 testimony and the two years didn't take into account two
4 years of appeals.

5 MR. MARTIN: Or a -- or a pandemic -- global
6 pandemic.

7 THE COURT: Well, that's a separate issue. I -- I
8 really, that -- I mean, it was on the condition that the
9 landlord not interfere. And, you know, it's my order. It's
10 my -- I understand my logic behind it and the logic was to
11 give you all two years to lease it, starting when you had
12 the opportunity to do so. Not, you know, two years would
13 run while you were prevented to do it. It seems to me that
14 that type of relief, if the circuit does not grant the --
15 issues the mandate, does not grant the stay, makes sense to
16 fix that. I mean, it's just contrary to the premise of the
17 order that, again, was that when your hand is free, you
18 should have two years to litigate. It wasn't a question of,
19 you know, the landlord, you know, like telling perspective
20 tenants not to talk to you. I mean, that would have been
21 interference. But the concept was you had two years to do
22 it. Not that you would have two weeks to do it after two
23 years of appeal -- a year and -- almost two years of
24 appeals.

25 MR. MARTIN: Yes. Craig Martin again, Your Honor.

1 And just to comment on that, and I -- and I appreciate what
2 you're saying because it sounds like what you're saying that
3 we might have two years from the completion of appeals,
4 which, obviously --

5 THE COURT: Right.

6 MR. MARTIN: -- would be much more time --

7 THE COURT: That's right.

8 MR. MARTIN: Our concern obviously was calculating
9 it from the entry of the order --

10 THE COURT: Right.

11 MR. MARTIN: -- put us -- actually put us into
12 September of last year. We -- you may have seen in the
13 documents we submitted, we did as --

14 THE COURT: You got an extension from the Second
15 Circuit.

16 MR. MARTIN: Yeah, we did ask for 60 days after
17 their ruling, and they gave that to us. We calculate that
18 to be February 15th, so obviously this is a very valuable
19 lease. We don't want to take any chance that we somehow
20 lose this -- this piece of property that we acquired due to
21 the passage of time. So --

22 THE COURT: Well --

23 MR. MARTIN: -- obviously our proposed form of
24 order has a paragraph 3C that says that we've satisfied the
25 contingency by entering into the sublease so that we don't

1 have to worry about the two year time period.

2 THE COURT: Right, but that's -- that's a good --
3 see that's why I think our interpretation's a little
4 different. It's not really satisfy the contingency; it's
5 just saying that this was -- that deadline was not -- I
6 didn't contemplate that deadline under these facts. That's
7 it --

8 MR. MARTIN: Okay.

9 THE COURT: But -- then I -- I guess I want to go
10 to a related point. The Circuit already gave Transform
11 extra time, visa ve the lease. It has before it a motion
12 for a stay of the mandate. Any court, including the
13 Circuit, can condition stay on various things. They
14 condition it on posting a bond, if there's a risk, for
15 example, you lose the sublease, just because there's a -- a
16 circ petition pending. And so the Circuit could say well,
17 we'll grant the stay if you post the bond. It could also
18 say we'll grant the stay as long as the two year condition
19 is extended. And you could certainly related to them this
20 section of the transcript where I say that's, you know, how
21 I viewed my order and it comes right out of the oral
22 argument and the discussion that you should have a full two
23 years to market and sell the lease, or to, you know, as a
24 sublease.

25 Given that that's in front of the Circuit already,

1 with those possibilities, I'm -- I am reluctant to just
2 charge ahead before they rule on the motion for a stay of
3 the issuance of the mandate.

4 MR. MARTIN: I understand that point, Your Honor,
5 Craig Martin, again. So it sounds like that potentially two
6 things that might, Your Honor's read the papers and I'm not
7 going to make a pitch for why we think the current order is
8 final. I understand where, Your Honor's coming from, it
9 seems like there are two options that might help solve the
10 problem. The first would be to invoke the rules in Your
11 Honor's court and set this for a final hearing. The reply
12 brief is due on the 25th and is on the -- is on the 25th,
13 so, you know, we would expect a ruling from the Second
14 Circuit on the stay of the mandate probably by the end of
15 the month, early February. But since we're concerned about
16 that timeline, it may make sense to invoke a Bankruptcy Rule
17 8005. There's also a Federal Rule of thought procedure
18 called Indicative Ruling --

19 THE COURT: Well that's it -- that's actually 8008
20 has the Indicative Ruling.

21 MR. MARTIN: 8008? I'm sorry, I misspoke, yeah.
22 Called Indicative Ruling, which allows us to do what, Your
23 Honor, just said, which is to, you know, write a letter to
24 the Clerk, and say that we had this hearing, provide the
25 transcript, and say that you've indicated your thoughts on

1 this record. I guess the one portion of that rule that's
2 not clear from this record is whether you would actually
3 grant our proposed order or whether you would clarify the
4 two year time frame to be two years from completion of, you
5 know, exhaustion of appeals, which would either be when the
6 mandate doesn't issue, I suppose, or if the Second Circuit
7 stays the mandate and the Supreme Court grants Cert -- it
8 could be, you know, we all know how long that takes, it
9 could be another couple of years. We just don't want to
10 lose our lease while that -- that time is pending; and I'm -
11 - as I'm sure, Your Honor, appreciates, there's some
12 confusion over when that deadline runs. We -- we believe
13 we've satisfied the requirements with the 6.3A offer as,
14 Your Honor has seen in the exchange of letters from November
15 and December, and that we've satisfied the contingency. But
16 --

17 THE COURT: Well --

18 MR. MARTIN: -- if, Your Honor, feels the mandate
19 issue prohibits you from -- from addressing that --

20 THE COURT: Well, there are two aspects of the
21 condition to the -- to the start of the lease. There's the
22 litigation contingency, and then there's the compliance with
23 the right of first offer, and compliance with the lease
24 itself. And you -- your motion duly seeks determination of
25 both of those points. The objection was premised almost

1 entirely on arguments why the first point, i.e. the
2 litigation contingency, is at best is premature, and at
3 worst something that I don't have the power to rule on.
4 There is a little bit in the objection about the second
5 point, which really said very little -- really it didn't say
6 anything more than the language in the denial letter, which
7 basically questioned whether the proposed subtenant fits
8 within 6.3 and is the type of tenant that can come in. I
9 don't think I'm in a position to give any indicative ruling
10 on that point yet, because I don't really have any evidence
11 other than is submitted in a motion as to the nature of the
12 subtenant's business. It may be fairly easy to decide that
13 issue, but I'm not sure I'm -- I can't give an indicative
14 ruling, I don't think, on that point.

15 I know you think you've made that case pretty
16 clearly, based on other leases that MOAC has granted, et
17 cetera, the nature of this subtenant's -- proposed
18 subtenant's business, et cetera, but -- but it's a different
19 issue than interpreting my own order, which is really the
20 first point.

21 MR. MARTIN: Perhaps the owner, Craig Martin
22 again, may by -- may be some combination of what I said,
23 which is that we make the Second Circuit aware of this and
24 we also adjourn this motion, pending the decision on the
25 mandate, and if the mandate is not stayed, we could then

1 seek a further hearing on these other issues and with the
2 clarity on the timing, we're then not, you know, pressed for
3 some arbitrary deadline where we need that decision or we'd
4 (indiscernible) the lease (indiscernible).

5 THE COURT: Right. Well, I don't want to short
6 circuit, Mr. Otsuka may want to -- may have some remarks on
7 this. I don't want to short circuit the arguments that MOAC has
8 made, but I did -- I did want to give you both my
9 preliminary thoughts on the divestiture issue.

10 First, I don't think that the mandate is -- the
11 issuance of the mandate is to be ignored. I think it is a
12 critical step in the appellate process, and until it's
13 issued, with -- with very limited exceptions, the -- the
14 lower court, I don't think has the ability to take an action
15 that would interfere with the appeal process, and I think
16 that's -- that's laid out pretty clearly in the case law on
17 the jurisdictional law. It's discussed in *United States v*
18 *Rivera*, 844 F.2nd, 916, 921 (2nd Cir. 1988), and I think
19 even more tellingly in, I wouldn't even try to pronounce it,
20 *Y L U G H I O U G H E N Y*, an *Ohio Coal Company v Milliken*,
21 200 F.3rd, 942, 951-52 (6th Cir. 1999) or a hearing on merit
22 denied 2000 US opt *Lexus* 3382, 6th Circuit, March 2, 2000.
23 Cert denied 531 US 818, 2000.

24 The Abner Coleman case that the reply mostly
25 relies on for the statement that the lower court can act in

1 certain circumstances where the mandate hasn't been issued
2 yet, was one where there was no request for a stay of it,
3 and the district court was up -- up against the speedy trial
4 issue. I think Deep v Boys, which -- which the reply also
5 relies on, pretty much sort of blindly cited the Abner
6 Coleman case with a broader proposition, and the -- the
7 Sixth Circuit case says, yes, even though ministerial, it
8 does have a meaning and I think, particularly where there is
9 a motion for a stay of the mandate, that's important and
10 that take is laid out in the advisory committee notes to
11 Rule 41D. But I'm not sure that gets MOAC to where it wants
12 to go here, because I'm not sure that the divestiture
13 doctrine really applies in this situation, necessarily.
14 There's a good discussion of it in Ray Winimo Realty Corp,
15 270 BR 99, SDNY 2001, also citing that and later cases in
16 another district court opinion Ratcliff v Rancheros Legacy
17 Meat Company, 2020 US District Lexus 127, 276 at 9 through
18 10, District Court Minnesota, July 2021; as well as by Judge
19 Chapman in Ray Sabine Oil and Gas Corp 548 BRF 674, 679,
20 Bankruptcy SDNY 2016.

21 So the -- the point there is that the mere fact of
22 a pending appeal doesn't divest the court of jurisdiction to
23 implement and enforce the order. That flips the burden of
24 getting a stay, pending appeal on its head. You wouldn't
25 have to move for a stay pending appeal, if the very fact of

1 and appeal divested the court of implementing the order it's
2 being appealed from. Instead, the rule makers said no, you
3 have to rule for a stay, pending appeal and win before that
4 happens. What -- what you can't do, under the divestiture
5 doctrine is expand on, or alter the order that's on appeal,
6 or interfere with the appeal. And I -- I think that's an
7 important point. Now, my order authorizing the assumption
8 and assignment of the lease from September 5, 2019, which
9 has the two year limitation in it, isn't really, I don't
10 think the subject of the appeal.

11 I think the subject of the appeal is the -- the
12 district court's determination that 363M deprived it of the
13 ability to reverse my order. On the other hand, this matter
14 is before the district court -- I mean, I'm sorry, it is
15 before the Court of Appeals in the Motion for Stay of the
16 Mandate. They have the ability to condition that request on
17 various things and I think it would be useful for the
18 District Court, for the Circuit Court, excuse me, to -- to
19 know my view of that two year limitation. And I think I
20 have the power to, through you, to let them know of that
21 view under Bankruptcy Rule 8008, which says that if a party
22 files a timely motion in the Bankruptcy Court for relief
23 that the Court lacks authority to grant, because of an
24 appeal, that has been docketed and is pending. The
25 Bankruptcy Court may defer considering the motion, deny the

1 motion, or state that the Court would grant the motion if
2 the court where the appeal is pending remands for that
3 purpose, or state that the motion raises a substantial
4 issue. And then B says the movant must properly notify the
5 clerk of the court when the appeal is pending, if the
6 Bankruptcy Court state that it would grant the motion or
7 that the motion raises a substantial issue.

8 And I think I would grant as modified, the motions
9 request with respect to the two year period, but really, by
10 saying that I don't believe that it applies, under these
11 facts, not because of anything wrong that MOAC did, but
12 because the premise of the two year limitation was that two
13 years was a reasonable time, if Transform was free to do so,
14 to find a tenant. And if it couldn't do so, by that point,
15 adequate assurance would require that it not hold onto the
16 lease anymore.

17 MR. OTSUKA: Your Honor, I didn't want to
18 interrupt. May I be heard on --

19 THE COURT: Sure. Yeah, go ahead, no I wanted to
20 lay that all out on the table. That's not a ruling. I want
21 to lay out my thinking so that you all can respond to it.

22 MR. OTSUKA: Your Honor, on the two year point, I
23 certainly understand that the Court is maybe giving more
24 color describing the Court's reasoning for why the order is
25 entered and it may be interpreting the Court's own order. A

1 couple of things that I would point out, however, in terms
2 of if the Court is inclined to say that the two years
3 doesn't begin to run until any appeal is final, whatever
4 that may mean. Obviously, Transform has been marketing this
5 sublease during this time. That's why they have a signed
6 sublease, right? So it doesn't make sense to me that they
7 should be given two more years when they have spent this
8 time, at least, some of it, probably most of it, marketing
9 and -- and looking for a subtenant, which they believe that
10 they have found a suitable subtenant.

11 THE COURT: Right.

12 MR. OTSUKA: So --

13 THE COURT: That -- can I interrupt you? That's a
14 fair point, but at the same time it has to be enough time so
15 that the deal can be closed -- or a deal can be closed after
16 what would be a reasonable condition, which is that the
17 prospective subtenant is reasonably assured that after it
18 closes, it won't be divested because of some further ruling
19 on appeal. So, I understand.

20 MR. OTSUKA: It --

21 THE COURT: Another two years is -- my point is
22 that the debtor, Transform shouldn't be up against a, you
23 know, an imminent deadline here, because of not its own
24 inability to market the premises but to close, because of
25 the pending appeals.

1 MR. OTSUKA: And I understand that, Your Honor,
2 and I would also point out, as Mr. Martin said and as the
3 Court recognized, the Second Circuit did extend that two
4 year period, and that was with the consent of MOAC.
5 Transform has not sought -- has not asked the Second Circuit
6 to extend that deadline. Maybe with the Court's comments
7 today, it may do so, but my only point is that that request
8 to further extend that deadline has not brought to MOAC, I'm
9 not sitting here today with an answer to that.

10 THE COURT: Right.

11 MR. OTSUKA: But my point is, we did consent for
12 that very reason, that Your Honor is pointing out. We
13 consented to the -- to the Second Circuit extending the
14 deadline out another 60 days. So I guess that's all I would
15 say about the two year time period.

16 THE COURT: Okay. All right.

17 MR. OTSUKA: In -- in terms of the jurisdictional
18 question, I'm not sure how much, Your Honor, wants to --
19 wants to hear on that. I -- I agree and it was -- this was
20 in my notes that what the Court said that a lower court may
21 not expand or alter its prior judgement that's on appeal,
22 and I think quite clearly, that's what Transform seeks here.
23 They're asking the Court, putting aside this -- the question
24 of did they satisfy the -- the two year provision?

25 All the other relief that they're asking for,

1 they're asking the Court to give an opinion on all these
2 other conditions that -- that Transform says it has
3 satisfied. We quite -- quite clearly say they haven't.
4 That -- I'm happy to get into the substance of that, but
5 that is very obviously expanding on the -- on the assignment
6 order. The assignment order --

7 THE COURT: Yes, but --

8 MR. OTSUKA: -- authorized --

9 THE COURT: -- but it doesn't seem to be
10 interfering with it. I mean, if -- if -- if -- see, I
11 actually think that is the type of thing that I could --
12 that aspect, I think I probably could rule on. I'm not sure
13 it's really T'd up for me to rule on today because I think I
14 need to hear some evidence on compliance with the right of
15 first offer and the, you know, and the lease in terms of an
16 acceptable subtenant. But that's -- that's a question that
17 is really, to me, very far removed from whether Section 363M
18 isolates consideration of my order on appeal. I think
19 that's a very different issue. I mean, for example, if --
20 if I had authorized the assumption and assignment of the
21 lease or -- or the -- yeah, the assumption and assignment of
22 the lease and it required ongoing adequate assurance
23 payments, right? Which it did in fact, I mean, it's only
24 \$10.00 a year, plus taxes, but if in year two, Transform
25 didn't pay the taxes and you wanted to enforce that cure

1 payment here as opposed to in Minnesota in state court, that
2 wouldn't interfere with the appeal. I mean, it's separate
3 issue. Say -- similarly with the ability to sublease. I
4 don't see how that interferes with the appeal. It's a --
5 it's a separate issue.

6 MR. OTSUKA: Your Honor, a few things. So first
7 of all, Transform is asking the Court to issue and order
8 that says Transform has prevailed in the litigation
9 regarding assignment of the Master Lease, therefore the
10 Master Lease assignment is fully valid and enforceable.

11 THE COURT: That's -- I -- that's the -- I
12 understand. That point, I understand and that's why I was
13 focusing on the two different issues. I think that --

14 MR. OTSUKA: So may --

15 THE COURT: And the reason they want that decided
16 is they're concerned about the two years. And but --

17 MR. OTSUKA: But Your Honor --

18 THE COURT: -- but they're also asking for a
19 determination that the right of first offer was complied
20 with and -- and -- that -- that and that the lease -- the
21 prospective subtenant is an acceptable tenant under the
22 lease, and to me, that -- that's different than saying all
23 of the litigation is done. Clearly, all of the litigation
24 is done, that's something before the Circuit, whether it's
25 done or not. That's up before the Circuit. That's the

1 process of getting a stay or not of the -- of the -- the --
2 the mandate and -- but that's all occasioned by what I think
3 is a misplaced concern by Transform, that they're up against
4 a deadline that's about to expire and may well expire before
5 Cirt is dealt with, and -- and I think that's a separate
6 issue. But as far as the other --

7 MR. OTSUKA: If you --

8 THE COURT: -- relief they're seeking, while I'm
9 not prepared to do it today, because this is not an
10 evidentiary hearing, I don't see how that interferes with
11 the appellate process.

12 MR. OTSUKA: I -- I'm sorry, Your Honor, just to
13 clarify, when you say the other relief they're seeking,
14 which -- which part of that were you referring?

15 THE COURT: Well, they -- they -- they attach to
16 their motion MOAC's letter which says we don't accept the
17 subtenant, and they want a determination that you've done
18 that improperly, because this is an acceptable subtenant,
19 and that the lease has been complied with. To me that's --
20 that -- that has very little, if anything to do with the
21 appeal. Whereas, if they ask for the determination they're
22 all -- that the litigation contingency is -- is over, well,
23 I think that -- that does have something with the appeal.

24 MR. OTSUKA: I understand.]

25 THE COURT: I mean, how could I tell the Second

1 Circuit that the litigation's over when they have a motion
2 pending before them for a stay of the mandate?

3 MR. OTSUKA: I -- I understand the distinction
4 you're just -- Your Honor's making, and I -- and I
5 certainly agree that there's a difference -- I'm not
6 conceded the same conclusion that, Your Honor, just said,
7 but I do agree that -- that is -- it's not proper for this
8 Court to make the determination that the litigation
9 contingency, as a whole, has been satisfied.

10 THE COURT: Right. Okay.

11 MR. OTSUKA: So -- I -- I don't know where that
12 leaves us right now.

13 THE COURT: Well, I think -- again, where I think
14 it leaves us is I could schedule an evidentiary hearing on
15 the lease compliance issues, if you will. You know, has the
16 right of first offer been complied with and is the proposed
17 subtenant a tenant that could be rejected by the landlord.
18 I don't want to have -- I mean, we're not having that
19 hearing today, it wasn't scheduled as an evidentiary
20 hearing. I don't know when I would have time to do it. I
21 don't know if anyone wants to take discovery on it. But I
22 don't -- I don't think anything more needs to be said on
23 that point today. What I don't believe requires an
24 evidentiary hearing, but which I also believe I should defer
25 on under Rule 8008, is a ruling on the other portion of the

1 motion which, as you said, seeks a determination that the --
2 the contingency has occurred. Which really means the
3 litigation is done. But I think I should state and
4 authorize and direct the movant, Transform, to so inform the
5 Circuit that I believe the two year limitation under my
6 order doesn't apply in these circumstances where the S&E
7 tenant, Transform, has obtained, under what apparently is a
8 -- a fully documented sublease, a tenant, and the only thing
9 impeding that tenant from taking, under the sublease, within
10 the two years is the fact of the pending appeal and -- and
11 litigation occasioned by the landlord's denial of
12 acceptability of the tenant and the right of first offer
13 being complied with. And I think, frankly, because you have
14 a pending motion for a stay of the mandate, if the Circuit
15 wants to grant that stay, it could put conditions on it like
16 extending the two year period, posting a bond, whatever. If
17 it doesn't extend -- if it doesn't stay the mandate, I
18 believe that at that point, I should determine, and I'm
19 telling you know how I will determine it, the two year
20 issue, and -- and determine that that two years doesn't run
21 until the appellate process is finished, with suitable time
22 to close the deal. And we'll leave it at that.

23 I mean, that's the really pressing dispute. That
24 really is a case for controversy. It's very live, I mean,
25 they lose this tenant if -- if that two years runs under the

1 interpretation that I'm not accepting, but I think there
2 should be an order that reflects that. I'm not accepting
3 it. And similarly, the issue of an acceptable tenant is --
4 is live too, and I think I have jurisdiction over it,
5 because it's part of the adequate assurance, you know, I
6 basically said, this has to get done. This part of the
7 assignment of the lease.

8 So I don't want to interfere with what you've T'd
9 up in the Circuit court, but I think they should know how I
10 would rule if they denied the stay and leave it at that.

11 So I would -- I would not dismiss the motion, I
12 would defer consideration of it. I think the parties should
13 discuss whether they need discovery, agree on a discovery
14 schedule, and get a hearing date for an evidentiary hearing,
15 which I think would be no more than half a day, and they can
16 get that from Ms. Lee in the clerks' office. And again, I -
17 - I'm telling you both now that I would make it clear that
18 the two year limitation doesn't apply in this situation
19 where those two issues, namely the acceptable tenant and
20 then right of first offer, have been raised by the landlord,
21 basically right at the end of the two year period, and the
22 appeals process has prevented the closing of what would
23 otherwise be a, you know, a real tenant, sublease. Because,
24 again, that wasn't -- that wasn't what I was addressing in
25 that condition of adequate assurance of future performance.

1 What I was addressing was a situation where Transform
2 literally didn't come up with someone, who was real, within
3 two years and just kept the landlord hanging out there,
4 potentially for up to 70 years, because that was the
5 remainder of the lease, which wasn't -- which I didn't
6 believe fair.

7 MR. OTSUKA: Thank you, Your Honor, if I --

8 THE COURT: So I don't think you needed an order
9 on this at this point. I think obviously you should get the
10 transcript, promptly, and let the Circuit know the result
11 and then you may want to give me a scheduling order or if
12 you're comfortable that you can take whatever discovery you
13 need before the hearing, just schedule the hearing and we'll
14 go ahead with the evidentiary hearing. If it's at any time
15 in the next couple of months, it will probably held
16 remotely. I have a well developed form of remote hearing
17 order and procedure that you can get from Mr. Andino in the
18 Clerks' office that, you know, just help you plan for that.

19 MR. MARTIN: Your Honor, this is Craig Martin.
20 Thank you for that. I think what I've heard you say is on
21 the 8008 indication to the Second Circuit, that we are
22 authorized and directed to do so, and that we can provide
23 the transcript. You won't be doing any type of writing on
24 that --

25 THE COURT: Right.

1 MR. MARTIN: -- so what we'll -- we'll figure out
2 how to do that, and then we will be happy to confer with Mr.
3 Otsuka so that our clients can decide how much discovery
4 they want and then work together to come up with an
5 appropriate hearing date on these other issues that you've
6 identified today.

7 THE COURT: And as -- and as you know from the
8 last evidentiary hearing before me, my practice is to take
9 direct testimony by declaration or affidavit with the
10 witness to be life for cross and redirect. And for the
11 parties to meet and confer and agree on the admissibility of
12 as many exhibits as they, in good faith, can agree on being
13 admissible, and submit a joint exhibit book, along with the
14 witness declarations of direct testimony to chambers a few
15 days before the evidentiary hearing, and a separate binder
16 of any exhibits whose admissibility they want to fight over.

17 MR. OTSUKA: Your Honor, Greg Otsuka, one more
18 time, or at least one more time for now. I heard you say
19 earlier, and I just want to make sure that the -- the
20 transcript is reasonably clear, since there won't be a
21 written order, that -- I heard you say that the two year --
22 in the Court's opinion, the two year deadline shouldn't
23 expire by virtue of the issues that you identified, but that
24 it also is not true that the two years should -- should
25 start over --

1 THE COURT: Yeah --

2 MR. OTSUKA: -- that there should be some
3 reasonable time --

4 THE COURT: There should be a reasonable time to
5 enable the identified transaction to close.

6 MR. OTSUKA: Understood.

7 THE COURT: Okay. I think you're on mute, Mr.
8 Martin, although I don't see the symbol of that, but you're
9 on mute. Maybe it's because you took off your headset? I
10 don't know.

11 MR. MARTIN: A can you -- are you able to hear me?

12 THE COURT: Yeah, now I -- now I can hear you.
13 Yeah.

14 MR. MARTIN: Just to be -- just to be clear on
15 that point, the -- the sublease has a provision that,
16 obviously, we have had a hard time getting a tenant, because
17 of the litigation, and there is a timeline on the litigation
18 resolution of 270 days. It -- so however long this takes,
19 it is foreseeable that our subtenant, if we exceed that time
20 period, would have the ability to exit, and we would
21 effectively be starting over on a subtenant, so -- I
22 understand if you don't want to make a ruling today, two
23 years may be appropriate, depending on what happens. It may
24 not --

25 THE COURT: If you --

1 MR. MARTIN: I don't want to impose that today --

2 THE COURT: I think all I can say at this point is
3 it should be a reasonable time and -- look the Circuit may
4 do all sort -- it may -- it may grant the stay, but it --
5 but impose a bond requirement. You know, there are lots of
6 things that could be done. So I don't want to take that
7 away from them. But I do want to let the know how I viewed
8 this order because it think that's important for them to
9 know. This condition in the order.

10 MR. MARTIN: And I appreciate that. I just wanted
11 it to be clear that we do -- even though the clock that Your
12 Honor -- we thought, Your Honor, set, may not be running, we
13 do have a clock running in our -- in our sublease.

14 THE COURT: A separate deal clock. That -- that's
15 fair and that's something you could raise with the Circuit.
16 I'm just focusing on a reasonable time at this point.

17 MR. MARTIN: Understood and thank you, Your Honor.
18 Unless you have any other question for me, I think we
19 understand where you're coming from and --

20 THE COURT: Okay.

21 MR. MARTIN: -- what steps you would like us to
22 take.

23 THE COURT: All right. Very well. Thank you.

24 MR. OTSUKA: Thank you.

25 MAN 1: Thank you, Your Honor.

1 WOMAN 1: Thank you, Your Honor.

2 THE COURT: Okay. I think that concludes the
3 mattes in the Sears case for today, so I'll be signing off
4 at this point. Thanks everyone.

5 MAN 1: Thank you, Your Honor.

6 WOMAN 1: Thank you.

7 (Whereupon these proceedings were concluded at
8 4:00 PM)

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1 C E R T I F I C A T I O N

2

3 I, Sonya Ledanski Hyde, certified that the foregoing
4 transcript is a true and accurate record of the proceedings.

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6

Sonya M. Ledanski Hyde

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8 Sonya Ledanski Hyde

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25 Date: January 24, 2022

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